

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
U.S. DISTRICT COURT
DISTRICT OF NEBRASKA
2007 APR 18 PM 3:06
OFFICE OF THE CLERK

BLACK GOLD POTATO SALES, INC.,)

Plaintiff,)

v.)

Case No. 4:07-CV-3082

AFFINITY PRODUCTION COMPANY, LLC,)

DAN KOCH, MIKE MYLON)

EISHENHOWER, and GARY BEYLEE,)

Defendants.)

STIPULATION AND ORDER

Plaintiff Black Gold Potato Sales, Inc. ("Black Gold"), by and through its undersigned attorney, and defendants Affinity Production Company, LLC and Dan Koch (collectively, the "Defendants"), by and through their undersigned attorney, hereby stipulate and agree to settle this matter on the terms set forth below, and the Court hereby approves this Stipulation and enters the Order thereon.

1. Black Gold is a trust creditor under the provisions of the Perishable Agricultural Commodities Act, 7 U.S.C. 499e(c) ("PACA"), against Defendants, on a debt in the amount of \$99,198.52, plus attorney's fees in the amount of \$3,000.00 and interest at the rate of 1.5% per month, which has accrued in the amount of \$20,850.34, for a total amount of \$123,048.86.

2. Defendants shall pay to Black Gold by certified check, cashier's check, or check drawn on the trust account of Defendants' counsel, payable to

"Black Gold Potato Sales, Inc.," the sum of Twenty Thousand and 00/100 Dollars (\$20,000.00), on or before Wednesday, April 25, 2007. Defendants shall thereafter pay to Black Gold an additional \$103,048.86 in separate, equal, weekly installments of \$10,000.00 commencing on Friday, May 11, 2007 and continuing each Friday thereafter until the \$103,048.86 is paid in full. All payments shall be made by certified check, cashier's check, or money order, payable to "Black Gold Potato Sales, Inc." and delivered to McCarron & Diess, 4900 Massachusetts Avenue, N.W., Suite 310, Washington, D.C. 20016 on or before the date payment is due.

3. To secure the payment of said amount, Defendants have executed a Joint Motion for Entry of Preliminary Injunction Order and Judgment, which will be held in escrow by the attorneys for Black Gold unless and until there is a Default, as defined in paragraph 6. (A copy of the Joint Motion for Entry of Preliminary Injunction Order and Judgment and Proposed Preliminary Injunction Order and Judgment are attached.)

4. If there is a Default (as defined in paragraph 6) in the payment of any of the payments referenced in paragraph 2, the aforesaid principal sum above mentioned in paragraph 1, or any balance that may appear to be unpaid thereon, together with all costs and reasonable attorney's fees to collect the sum due (including those incurred prior to the date of the Stipulation and Order and in any proceedings to determine additional costs and fees) (hereafter "the Debt"), shall,

at the option of Black Gold, thereupon become immediately due and payable, and Black Gold, upon the filing of an affidavit as to such default by Black Gold's attorney with the Court, with a copy thereof to Defendants' counsel, shall be entitled to file the previously executed Joint Motion for Entry of Preliminary Injunction Order and Judgment and obtain a Judgment against Defendants, under the trust provisions of PACA, for the full amount of the debt. Black Gold agrees and understands that the liability of Defendants under such Judgment shall be limited to the full principal amount due plus all accrued interest and all attorneys' fees due, as stated hereunder, less any payments made by Defendants under this Stipulation and received by Black Gold prior to the Default.

5. In consideration for Defendants' promise to make the payments referenced in paragraph 2 and the agreement of Defendants to stipulate to entry of judgment under the terms stated herein, Black Gold hereby agrees to forebear from further prosecuting this lawsuit against Defendants and from further enforcing its alleged trust rights under PACA, and Black Gold further agrees to immediately withdraw and hold in abeyance any application for temporary restraining order or preliminary injunction whether currently pending or otherwise, so long as Defendants are not in Default under this Stipulation, as defined in paragraph 6.

6. In the event Defendants fail to remit any payment when due hereunder, Black Gold shall give notice to Defendants that such performance is

delinquent. Notice of said delinquency will be deemed given by Black Gold to Defendants upon providing written notice via fax to Defendants' counsel at fax no. (402) 474-5393 or at such other numbers as Defendants may notify Black Gold's attorney in writing. Defendants shall then have seventy-two (72) hours from receipt of such notification within which to cure said delinquency by providing payment for receipt by Black Gold of the full amount then past due under the terms of this Stipulation. In the event Defendants fail to cure said delinquency within this seventy-two (72) hour period, Defendants shall be in Default under this Stipulation.

7. Nothing herein, including the installment nature of the payments being made hereunder, shall be deemed, interpreted or otherwise construed as an extension of credit by Black Gold to Defendants, or as a waiver of Black Gold's rights under the statutory trust provision of PACA. Black Gold's rights under this Stipulation and Order are in addition to its rights under said trust provision.

8. Effective upon receipt by Black Gold of \$123,048.86, in accordance with the terms set forth herein, and conditioned upon the absence of any uncured Default by Defendants under this Stipulation, Black Gold hereby completely, finally, and forever releases and discharges Defendants and Mike Mylon Eisenhower, and Gary Beylee, and all other officers, directors, managers, employees, agents, representatives, subsidiaries, parents, and affiliates of any of the foregoing (collectively, the "Released Parties"), of and from any and all liability,

rights, demands, claims, obligations, causes of action, actions, suits, controversies, debts due, sums of money, interest, attorneys fees, trespasses, privileges, torts, and damages of every kind, nature and description whatsoever, which Black Gold has against the Released Parties, as of the date of final execution of this Stipulation, whether known or unknown and whether arising from or relating to the claims it has asserted in this lawsuit and any other claims and/or demands made by Black Gold or its attorneys. Upon receipt of the full payment of \$123,048.86, in accordance with the terms set forth herein, Black Gold shall prepare and file a Stipulation to Dismiss With Prejudice with this Court.

9. The Court shall retain jurisdiction over the parties during the pendency of the application of this Order.

10. Defendants Mike Mylon Eisenhower and Gary Beylee are hereby dismissed from this action without prejudice.

11. This case shall be administratively closed, with the Court retaining complete jurisdiction to reopen this case and enforce the terms of this Order upon application by any of the parties hereto.

Dated this 13 day of April, 2007

IT IS SO STIPULATED.

McCARRON & DIESS

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Attorneys for Plaintiff

SO ORDERED this 18th day of April, 2007.

Richard A. Kopt
U.S. District Court Judge
Richard A. Kopt